Case No. SC 03-1251

IN THE SUPREME COURT IN AND FOR THE STATE OF FLORIDA

ERICA TYNE, BILLY-JO FRANCIS TYNE, individually, ERICA TYNE and BILLY-JO FRANCIS TYNE on behalf of decedent FRANK WILLIAM "BILLY" TYNE, JR., DEBRA J. TIGUE, individually, DALE R. MURPHY, JR., a minor, individually and on behalf of decedent DALE R. MURPHY, by and through his next of kin and guardian, JERILYNN M. AMRHEIN, and DOUGLAS EDWARD KOSKO, individually.

Plaintiffs/Movants,

v.

TIME WARNER ENTERTAINMENT CO., L.P., d/b/a WARNER BROS. PICTURES, a Delaware limited partnership, BALTIMORE/SPRING CREEK PICTURES, L.L.C, a Delaware limited liability company, and RADIANT PRODUCTIONS, INC., a Delaware corporation.

Defendants/Respondents

On a Certified Question from the United States Court of Appeals For the Eleventh Circuit
Case Number: 02-13281

MOVANTS' REPLY BRIEF ON QUESTION CERTIFIED BY THE ELEVENTH CIRCUIT

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SUMMARY OF ARGUMENT

The certified question presented to this Court regarding Section 540.08, Fla. Stat. is essentially one of statutory interpretation. Does the statute provide a remedy where a person's name or likeness is commercially exploited without consent in a film which may be said to represent unprotected speech because of undisclosed fictionalization as was done in The Perfect Storm? The plain meaning and manifest intent of the statute cover precisely this situation. Section 540.08(1) makes actionable the unauthorized use of a person's name, portrait or other likeness "for purposes of trade or *any commercial* or advertising *purpose*."

Clearly, a commercially produced movie is covered by the plain language of the act, subject only to the doctrines of newsworthiness or protected speech. A court interpreting a statute must seek to give effect to all of its words and reject an interpretation that nullifies any part of the statute. The Eleventh Circuit concluded that failure to give the term "any commercial purpose" a meaning separate and distinct from mere product promotion or advertising would make the term meaningless, and would render the statute's newsworthiness and artistic resale exemptions illogical surplusage. *See* § 540.08(3)(a) & (b), Fla. Stat.

The certified question presented to this Court appears to focus upon the scope of the statute and the meaning of the term "any commercial purpose", and not whether

the First Amendment is an absolute bar to any action brought which does not allege direct product endorsement. The Eleventh Circuit Court of Appeals is fully capable of determining the scope of protection, if any, provided by the First Amendment given the allegations of constitutional malice and the evidence adduced below. Indeed, it is fair to assume that the Eleventh Circuit was not persuaded by the First Amendment argument raised by Warner in that court, since a determination favorable to Warner on that issue would have obviated the need for certification to this Court. Because this case involves the unauthorized use of name and likeness for a clearly commercial purpose, this Court should answer the certified question by holding that such conduct falls within the scope of the statute, subject only to the newsworthy and legitimate public interest exemption.

ARGUMENT

I. This Court must reject Warner's interpretation of Section 540.08 because that interpretation avoids its plain meaning and nullifies the statute.

The Eleventh Circuit recognized its obligation to give effect to every word of the statute, and reject interpretations that nullify portions of the act. *Tyne v. Time Warner Entertainment Co., L.P. No. 02-13281,* slip op. at 9 (11th Cir. July 9, 2003), (citing *Hechtman v. Nations Title Ins. Co.,* 840 So. 2d 993, 996 (Fla. 2003). Giving effect to words which expressly enhance the scope of remediation is particularly

important since such statutes must be read broadly to accomplish their purpose. *See Stern v. Miller*, 348 So. 2d 303, 308 (Fla. 1977); *Nolan v. Moore*, 81 Fla. 594, 605, 88 So. 601, 605 (1921). Rather than derogating from common law or limiting remedies, this statute states that its provisions are "in addition to and not in limitation of" those under common law. § 540.08(6), Fla. Stat. While the common law provided remedies for misappropriation for advertising purposes, it is clear that the Legislature intended to go beyond the common law. *See Facchina v. Mutual Benefits Corp.*, 735 So. 2d 499, 502 (Fla. 4th DCA 1998) (legislature expressly created a new statutory cause of action under section 540.08); *Comptech Int'l, Inc. v. Milam Commerce Park Ltd.*, 753 So. 2d 1219, 1221 (Fla. 1999) (explicitly approving *Facchina* and noting that "if the courts limit or abrogate such legislative enactments through judicial policies, separation of powers issues are created); *Florida Convalescent Centers v. Somberg*, 840 So. 2d 998, 1007 (Fla. 2003) (Anstead, Ch.J., concurring) ("when the legislature creates a statutory cause of action...it is presumed to know the common law of contract and tort and the limitations on such remedies created by judges").

In essence, Warner argues that the term "commercial purpose" should be read out of Section 540.08, limiting the application of the statute solely to product promotion or advertising. Warner's argument renders the entire statute a nullity because Section 540.08 would simply mirror the existing common law and frustrate

the explicit intent of the Florida Legislature to enhance and supplement the common law of privacy. *See* § 540.08(6), Fla. Stat.

Warner's selective use of certain canons of statutory construction to avoid the ordinary and plain meaning of Section 540.08 is inappropriate "where the language of [the statute] is clear and amenable to a reasonable and logical interpretation." *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1234 (Fla. 2000) (courts are without power to diverge from the intent of the legislature as expressed in the plain language of the statute). The primary rule of statutory interpretation is to implement the plain and usual meaning of the words of the statute. No other canon overrides the rule of plain meaning and clear legislative intent.[1]

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[1]*Ejusdem generis* does not apply here since the term "commercial purpose" is readily understood. Furthermore, e*jusdem generis* applies to clarify a subsequent general term with reference to a previous specific term. *See In Dunham v. State*, 140 Fla. 754, 757-58, 192 So. 324, 326 (1939)*; see also Ex parte Amos*, 93 Fla. 5, 15, 112 So. 289, 293 (1927) (position of words is a factor). Here, the specific term "advertising" is subsequent to the general term "commercial". Similarly, the related maxim, *noscitur a sociis*, which is used to clarify vague terms by reference to clearer associated terms, is inapplicable, since there is nothing vague about the term "commercial purpose." The maxim should not be used to make the meaning of the general term identical to the associated term because that violates the primary rule that effect must be given to every part of a statute and that its words should be taken according to their natural meaning. *See Children's Bootery v. Sutker*, 91 Fla. 60, 66, 107 So. 345, 347 (1926); *Halifax Area Council on Alcoholism v. City of Daytona Beach*, 385 So. 2d 184, 187 (Fla. 5th DCA 1980); *Mason v. U.S.*, 260 U.S. 545, 554 (1923). Resort to these peripheral rules of statutory construction should not serve to nullify the term "any commercial purpose" or to frustrate a clear expression of legislative intent.

II. The First Amendment does not require "Commercial Purpose" to be given an unduly restrictive interpretation in view of the Newsworthy Exemption.

In asking this Court to construe the term "any commercial purpose" in a manner so as to exclude all commercial activity other than mere advertising, Warner hopes to avoid any discussion as to whether the unauthorized depictions of Plaintiffs qualify for protection under the doctrines of newsworthiness or protected speech. However, that approach makes little sense in interpreting Section 540.08 which contains an express provision exempting from the scope of the statute activity which is protected by considerations of newsworthiness or free speech under the First Amendment, unless an advertising purpose is involved. *See* § 540.08(3)(a), Fla. Stat.

The newsworthy exemption set forth in Section 540.08(3)(a) is rendered mere surplusage under the approach urged by Warner. *See, e.g. Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999) (reading of statute that would render its language superfluous or redundant is disfavored). This is precisely the concern voiced by the Eleventh Circuit in its decision. *See Tyne*, slip op. at 9. It is the newsworthy exemption and not a negation of the term "any commercial purpose" which properly avoids the "substantial confrontation" with the First Amendment that would result from a broader view of the scope of the statute. *Loft v. Fuller*, 408 So. 2d 619, 623 (4th DCA, 1981), *rev. denied*, 419 So. 2d 1198 (Fla. 1982).

The protection afforded by the First Amendment, which is at least as broad as, if not coterminous with, the exemption afforded by Section 540.08 (3)(a), is forfeited where culpable falsehood is shown.[2]

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[2]Neither Warner nor its allied amici contend that the newsworthy exemption contained in Section 540.08(3)(a) provides any broader protection than the First Amendment. Thus, where a report of an otherwise newsworthy event is published with culpable falsehood, the report loses any protection it may have under the newsworthiness doctrine or the First Amendment. *See Time, Inc. v. Hill*, 385 U.S. 374, 389-90 (1967)*; Cantrell v. Forest City Publ'g, Co.*, 419 U.S. 245, 248-49 (1974). For the benefit of Warner's amicus counsel, the term "culpable falsehood" is a short-hand expression for the degree of fault constitutionally required in a defamation or privacy action against a media defendant. *See Messenger v. Gruner + Jahr USA Publ'g*, 994 F. Supp. 525, 531 (S.D.N.Y. 1998) *rev'd on other grds*, 208 F.3d 122 (2d Cir. 2000); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)*; Time, Inc. v. Hill, supra; New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964); *Solano v. Playgirl, Inc.* 292 F. 3d 1078 (9th Cir. 2002), *cert denied*, 123 S.Ct. 1078 (2002); *People's Bank & Trust Co. of Mountain Home v. Globe Int'l Publ'g*, 978 F.2d 1065 (8th Cir. 1992). Here, Plaintiffs have alleged actual or constitutional malice despite their status as private individuals. *See infra* note 7.

To allay the fears expressed in the amicus brief of the Florida Media Organizations, Plaintiffs underscore that innocent errors in "the daily fare of news coverage" would never be actionable under Section 540.08 if only because such errors presumably would lack the requisite degree of culpability. Newspapers already operate under the standards announced respectively in *Times v. Sullivan* (in the case of reporting facts about a public figure) and *Gertz v. Welch* (in the case of reporting facts about a private individual). Plaintiffs' construction of the statute would effect no change whatsoever in the liability faced by newspapers in the reporting or asserting of objective facts and would merely seek to hold filmmakers accountable under the same standards. Political satire, comment and parody, unless reasonably capable of being understood as asserting objective facts, are unconditionally protected by the First Amendment and would not be reached by any interpretation of the statute sought by Plaintiffs. *See Hustler Magazine, Inc. v.*

In works which are defended as admitted fiction,[3] the test for culpable falsehood must be adjusted since "fiction, by definition, is false." *Peoples's Bank &Trust Co. of Mountain Home v. Globe Int'l Publ'g*, 978 F.2d 1065, 1070 (8th Cir. 1992). "[T]he constitutional analysis for works of fiction, therefore, must first determine what factual assertions, if any, are held out as true." *Id.* at 1070-71. In that case, the Globe defended the challenged article as "pure fiction". The Eighth Circuit, expressly relying upon *Time, Inc. v. Hill,* 385 U.S. 374 (1967), stated that "the central issue on appeal is the existence of actual malice: whether the Globe intended, or recklessly failed to anticipate, that readers would construe the story as conveying actual facts or events concerning [plaintiff] Mitchell." 978 F. 2d at 1068. Warner fails to apply this test for

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Falwell, 485 U.S. 46 (1988). The question faced by this Court, rather, is whether unprotected speech is implicated by the statute when the unauthorized use of an individual's name or likeness is used for a commercial purpose other than extrinsic product promotion

[3]It must be emphasized that Warner's belated acknowledgment that *The Perfect Storm* is, in the words of Wolfgang Peterson, its Executive Producer and Director, "largely fictionalized," should not be confused with the film having been marketed as avowed fiction. *See* Movant's Initial Brief at 7. To the contrary, Warner marketing executives admitted in deposition to hyping the "authenticity of the story" and the film's "not as fiction" quality despite having received written notice by the filmmakers "that we may be open to criticism for the changes [we] made in the nature of the characters and in various events." *See* Movant's Initial Brief, pp. 13-14. Prior to these depositions, Warner steadfastly refused to admit to any fictionalization. *See* Warner's Answer to Complaint (Docs. 133, 136); Warner's Response to Request for Admissions (Doc. 105).

works of admitted fiction, an understandable reluctance given its marketing campaign to sell the film as "authentic."

Nor can Warner rely on its supposed "disclaimer." At best, the disclaimer is equivocal and indefinite about which characters or portrayals were "dramatized" [the disclaimer avoids the use of the term "fictionalized"] and which characters or portrayals were based upon historical events. This confusion is manifest in the inability of the filmmakers and Warner executives themselves to distinguish those portions of the film which were entirely fabricated [including events which took place on shore and for which there was an historical record] and those portions which were based on Sebastian Junger's nonfictionalized account. *See* Movant's Initial Brief at p. 31. The Eighth Circuit was confronted with a similar nonspecific and essentially ineffective disclaimer by the Globe where "its own writers could not tell which stories were true and which were completely fabricated." 978 F.2d at 1071. The court held that "the test is not whether the story is or is not characterized as 'fiction', 'humor', or anything else in the publication, but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated." *Id.* at 1068-1069.

Warner distorts the holdings of a number of cases which discuss the parameters of protected speech in cases involving media defendants. For example, Warner relies

upon language in *Partington v. Bugliosi*, 56 F.3d 1147, 1159 (9th Cir. 1995) that "authors should have 'breathing space' in order to criticize and interpret the actions and decisions of those involved in a public controversy." However, an examination of that decision reveals that the Ninth Circuit correctly rejected attorney-plaintiff's defamation claim since defendants' description of plaintiff's performance during a celebrated criminal trial fell within the rule of protected opinion as opposed to assertion of objective fact and thus was protected speech. *Id.* at 1153. The test utilized in *Partington,* consistent with the test in *Globe,* is "whether a reasonable factfinder could conclude that the contested statement implies an assertion of objective fact." *Parington,* 56 F.3d at 1153 [citations omitted].[4] Again, Warner fails to view The Perfect Storm through this prism of analysis, knowing all too well the outcome.

Warner also wrongly relies upon *Victoria Price Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir. 1981). That case involved a defamation and privacy

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[4]The United States Supreme Court has repeatedly held that "under the First Amendment there is no such thing as a false idea...[b]ut there is no constitutional value in false statements." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) (citing *Gertz*, 418 U.S. at 339-40). *Milkovich* went on to limit the protection afforded opinions and exclude from the First Amendment so-called "opinions" which imply a false assertion of fact uttered with the requisite culpability. *Id*. at 18-22. The requisite culpability, in a case involving admitted fiction, is "whether [the publisher] intended, or recklessly failed to anticipate, that readers would construe the story as conveying actual facts or events concerning [plaintiff]." *Globe*, 978 F.2d at 1068.

action by the criminal prosecutrix in the celebrated Scottsboro trial. The Sixth Circuit affirmed the district court's directed verdict in favor of defendant on the grounds that her portrayal, while admittedly derogatory, was not published with knowing or reckless falsity as required by the First Amendment given her standing as a public figure. *Id*. at 1236-37. The court expressly rejected the alternative defense based upon the privilege of fair comment or opinion, noting that "this play does not say to the viewer that this is NBC's opinion about the character and actions of [plaintiff] Victoria Price." *Id*. at 1233. "The portrayal of Victoria Price in this way is not expressed in the play as a matter of opinion. The characterization is expressed as concrete fact." *Id*.

Similarly, the admittedly fictionalized and hurtful portrayals of Captain Tyne and the others are not expressed as opinions, but rather as concrete facts.[5] Certainly, no legitimate claim can be made that these portrayals fall under the protective umbrella of satire, parody, political opinion or fair comment. *See generally, Hustler Magazine,*

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[5]As noted by the Eleventh Circuit, the film presented , "unlike the book, ... a concededly dramatized account of both the storm and the crew of the Andrea Gail." *Tyne,* slip op. at 4. While marketing the film as "authentic," Warner falsely portrayed Captain Tyne "as a down-and-out swordboat captain who was obsessed with the next big catch...and relates an admittedly fabricated depiction of Tyne berating his crew for wanting to return to port in Gloucester, Massachusetts." *Id*. The Eleventh Circuit further observed that Warner "took additional liberties with the land-based interpersonal relationships between the crewmembers and their families." *Id*. Only in deposition did Warner officials and filmmakers admit that these depictions and portrayals were entirely fabricated and at odds with the facts set forth in Junger's book. *See* Movant's Initial Brief at pp. 5-13.

Inc. v. Falwell, 485 U.S. 46 (1988). In *Pullum v. Johnson*, 647 So. 2d 254, 258 (Fla. 1st DCA 1994), cited by Warner, the First DCA stated:

> "While the protections of the First Amendment are available to the publisher whether he writes in terms of fact or opinion, the immunity cannot be extended to allow unlimited substitution of views or conclusions, whether grounded in honesty and good faith or otherwise, in the place of known facts where the publication does not indicate to the reader that such a substitution has been made."

Warner also confuses the protection afforded by the First Amendment and the common law limitations of commercial misappropriation. Warner cites to *Ruffin-Steinback v. dePasse*, 82 F. Supp. 2d 723 (E.D. Mich. 2000) and *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996). *See* Warner's Brief at 19. Both those cases were decided under the Restatement which expressly limits recovery to only those instances involving extraneous product endorsement. *See* 82 F. Supp. 2d at 729-30; 949 F. Supp at 336. Admittedly, similar common law limitations existed in Florida prior to the enactment of Section 540.08. However, neither *Ruffin-Steinback* nor *Seale* can be read to provide an across-the-board First Amendment defense to the partly fictionalized publications at issue, since in each case counts for false light and/or defamation were sustained. *See* 82 F. Supp. 2d at 733; 949 F. Supp at 338-39.

Warner's confusion is most apparent in its summary argument that any interpretation of Section 540.08, which expands the rights and remedies of privacy law

beyond the existing common law, runs afoul of the First Amendment.[6] *See* Warner's Brief at pp. 2-3. Warner approaches the boundary that exists between protected speech and the law of privacy from the wrong side of the divide. A state, in the exercise of its inherent police powers, is free to create new causes of action in the areas of privacy or defamation as long as no cause of action can be asserted against a media defendant in the absence of showing the constitutionally required degree of culpable falsehood.[7] Where such requisite culpable falsehood is established, there are no constitutional restrictions on a state's expansion of its law of privacy or defamation. Thus, for example, Florida or any other state is free to expand its law of

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[6]In addition to being conceptually flawed, Warner's argument must necessarily conclude that Section 540.08(6) is an unlawful exercise of legislative prerogative since it expressly purports to supplement the common law rights and remedies of privacy. *See Facchina*, 735 So. 2d at 502 ("In crafting new statutory causes of action, the legislature is master of the elements and boundaries on the new cause of action."). Warner offers no authority for this nullification of legislative prerogative.

[7]In *New York Times v. Sullivan*, 376 U.S. at 279-80, the Supreme Court held that knowingly or recklessly uttered false speech is actionable under the First Amendment even in the case of public officials. In *Gertz v. Welch*, 418 U.S. at 346, the Court held that the negligence standard of fault is sufficient where the plaintiff is a private individual involved in a matter of public interest. *See Miami Herald Publ'g Co. v. Ane*, 458 So. 2d 239, 241 (Fla. 1984) (adopting *Gertz* standard of negligence for private plaintiffs). However, the Court in *Gertz* required a showing of *New York Times* actual malice (knowing or reckless disregard, and not mere negligence) by a private defamation plaintiff seeking punitive damages. 418 U.S. at 349. Here, Plaintiffs have alleged and established the more stringent standard of fault.

defamation to permit recovery by a decedent's estate or to extend privacy actions to the surviving family members on behalf of the decedent. That is precisely what the Florida legislature accomplished in Section 540.08 (1)(c) and(4) (permitting action to be brought within 40 years from the death of decedent where consent not obtained). *See also Facchina*, 735 So. 2d at 502.

In a desperate effort to shore up its legal argument, Warner resorts to a parade of horribles. Warner claims that a series of well-known films based upon historical people and events or based upon books about historical people and events could not be made under Plaintiffs' reading of the statute "unless their makers could demonstrate that they were not in any respect fictional or dramatized, or that every specific incident of fictionalization had been fully disclosed". *See* Warner's Brief at notes 36 and 37. Warner's fears are without merit. First, the aggrieved individual would bear the burden of proof with respect to establishing culpable falsehood under the applicable constitutional standard. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). Second, Warner's choice of well-known films to illustrate its overstated fears is curious. In almost every film title noted by Warner, the productions had contracted for the consent and active participation of the characters central to the story portrayed or were otherwise free of any substantial and material falsity or undisclosed

fictionalization[8].

Finally, Warner's own business practices betray their purported fears. Warner

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[8]In most of the cited works (Apollo 13, Reversal of Fortune, Raging Bull, The Right Stuff, and Good Morning Vietman), the actual persons central to the story were either engaged on screen or behind the cameras. *See* Credits for each film available on line at htpp://imdb.com: for Apollo 13, *see* htpp://genekranz.com & htpp://imdb.com/title/tt0112384/trivia; for Reversal of Fortune, *see* htpp://imdb.com/title/tt100486/trivia; for Raging Bull, *see* htpp://imdb.com/title/tt0081398/trivia; for Good Morning Vietnam, *see* Jeremy Shweder, "Say Good Morning to the Real Life Adrian Cronauer," *Radio and Records*, April 30, 1999; *see also*, Suzanne Shale, *The Conflicts of Law and the Character of Men: Writing Reversal of Fortune and Judgment at Nuremberg*, 30 U.S.F. L. Rev. 991 (1996). The producers of A Civil Action engaged both of the opposing attorneys portrayed in the film, reportedly paying Jan Schlichtmann (played by John Travolta) more than $250,000 for his consent. *See* Dan Kennedy, "Don't quote Me," *The Boston Phoenix*, Jan. 1-8, 1998. Boys Don't Cry is also an odd choice, as that studio (Fox Searchlight) was successfully sued for unauthorized use of name and likeness. *See* Anita M. Busch, "Boys Don't Cry Lawsuit Settled," *The Hollywood Reporter*, Mar. 10, 2000; Lucy Barrick, "Nice Life...We'll Take It," ZA@PLAY, Apr. 28, 2000. Finally, Nixon, while perhaps selective in its use of factual material, was nonetheless heavily researched and presented a view of the former President which was consistent with media accounts of his excessive drinking, depression, paranoia, and his secret plans to use nuclear weapons in Vietnam. Notably, Nixon opened with an explicit statement framing the movie as the director's opinion of events. *See* Roger Ebert, Nixon, *Chicago Sun Times*, Dec. 20, 1995.

The amicus brief of The Motion Picture Association of America chooses an even more odd example. It claims that "influential films as Citizen Kane...would never have been made for fear of ensuing litigation" if Plaintiffs' position had been the law at the time. *See* Amicus Brief of Motion Picture Association at n. 1. Filmmaker Orson Wells gave the protagonist of that film, Charles Foster Kane, a fictitious name to avoid litigation with William Randolph Hearst who apparently inspired Wells to write Citizen Kane. *See The Battle Over Citizen Kane* (1996) (VHS distributed by WGBH, Boston, MA and packaged with Time Warner's HBO film RKO 281*)* (available at Amazon.com). Hearst's name was not exploited and civilization did not come to a halt. Average Floridians should be treated similarly.

withheld documents which established that it had a policy requiring the obtaining of consent from persons depicted in the film after providing such persons with pages or a synopsis of the script reflecting their depiction. *See* January 16, 2003 Hearing Transcript, pp. 18-20 (Doc.142). Previously, Warner had denied such a policy existed. *See* Padrick Deposition at p. 20 (Doc.118). In numerous instances in *The Perfect Storm*, Warner changed the names of actual persons and used fictitious names in their place when such consent was not forthcoming. (Docs. 133 and 136, par. 42). Warner paid compensation to several other persons depicted in the film who expressly contracted to permit fictionalization of their characters. (Doc. 118, Ex.11). In sum, acceptance of Plaintiffs' construction of Section 540.08 would neither infringe upon the First Amendment nor unduly interfere with established business practices of the news and entertainment industries. This Court should reject Warner's attempt to void legislative prerogative by its skewed view of free speech which ultimately marginalizes the true value and importance of the First Amendment.

CONCLUSION

For the reasons set forth above, this Court should answer the certified question by finding that Section 540.08 applies to the facts of this case subject only to the statutory newsworthy and legitimate public interest exemption.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Movants' Reply Brief on Question Certified by the Eleventh Circuit has been furnished first class mail, postage prepaid, to: Gregg D. Thomas, Holland & Knight, LLP, P.O. Box 1288 (33601-1288), 100 N. Tampa Street, Suite 4100, Tampa, Fl 33602-3644 and Robert C. Vanderet, O'Melveny & Myers, 400 S. Hope St., Suite 1060, Los Angeles, CA 90071-2899; David S. Bralow, Florida Media Tribune Company, 600 N. Orange Avenue, Orlando, FL, 32801; George Freeman, Associate General Counsel, New York Times Company, 229 West 43rd Street, New York, NY 10036; Charles A. Carlson, Barnett, Bolt, Kirkwood & Long, P.O. Box 3287, Tampa, FL 33601-3287; John F. Bradley, 1215 East Broadway Blvd., Ft. Lauderdale, FL 33301; Jean-Paul Jassy, Loeb & Loeb, LLP, 10100 Santa Monica Blvd. Suite 2200, Los Angeles, CA, 90067-4164; Jon L. Mills, and Timothy McLendon, 2727 N.W. 58th Blvd., Gainsville, FL 32606; W. Edward McLeod, Jr., W. EDWARD McLEOD, P.A., PO Box 917412; Longwood, FL 32791-7412 on this 12th day of September, 2003.

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Stephen J. Calvacca, Esquire

CERTIFICATE OF COMPLIANCE

This brief is submitted under Rule 9.210 of the Florida Rules of Appellate Procedure and the undersigned hereby certifies that the brief complies with the font and other requirements set forth in Rule 9.210(a).

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Stephen J. Calvacca, Esquire